90-1545

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES N. MOSS, Staff Sergeant,
United States Marine Corps,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in order to effect the constitutionally mandated reasonable doubt standard, due process requires that a three-member panel of a review court, which acts as a second trier of fact, vote *unanimously* to affirm a criminal conviction?

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No. ———

JAMES N. MOSS, Staff Sergeant,
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v.

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Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, James N. Moss, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals, rendered in this proceeding on January 7, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Moss*, —— M.J. —— (C.M.A. January 7, 1991), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Moss*, No. 89-1152, slip op. (N.M.C.M.R. May 18, 1990), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals granted the petition for review on December 4, 1990. The decision of that court was rendered on January 7, 1991, affirming petitioner's conviction of May 5, 1988, as affirmed by the United States Navy-Marine Corps Court of Military Review on May 18, 1990. The jurisdiction of this court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V

> No person shall be . . . deprived of life, liberty, or property without due process of law . . . .

STATUTE INVOLVED

10 U.S.C. § 866(c). Review by Court of Military Review.

* * * *

(c) In a case referred to it, the Court of Military Review . . . may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and *fact* and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine questions of fact, recognizing that the trial court saw and heard the witnesses. (Emphasis added.)

REGULATION INVOLVED

10 U.S.C. § 866, COURTS OF MILITARY REVIEW RULES OF PRACTICE AND PROCEDURE, Rule 4(a), Quorum.

(a) In panel. When sitting in panel, a majority of the judges assigned to that panel constitutes a quorum for the purpose of hearing or determining any matter referred to the panel. The determination of any matter

referred to the panel shall be according to the opinion of the majority of the judges participating in the decision.

STATEMENT OF THE CASE

Petitioner was charged with rape.[1] He pleaded not guilty. On May 5, 1988 he was convicted by a military judge at a general court-martial.[2] The military judge sentenced petitioner to five years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

A three-member panel of the Navy-Marine Corps Court of Military Review affirmed the findings and sentence in an unpublished decision. *United States v. Moss*, No. 89-1152, slip op. (N.M.C.M.R. May 18, 1990). The Senior Judge of the panel dissented, stating that she was not convinced of petitioner's guilt beyond a reasonable doubt. *Id.*

The Court of Military Appeals granted review on two issues.[3] It thereafter affirmed the lower court's decision. *United States v. Moss*, —— M.J. —— (C.M.A. 1991).

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[1] 10 U.S.C. § 920(a), Article 120(a) (1982 and Supp. 1984).

[2] A military accused may elect to be tried before a judge or a panel of officers and enlisted members selected by his commanding officer.

[3] Whether the two-thirds vote by the reviewing court's three-member panel on the issue of petitioner's guilt beyond a reasonable doubt satisfied due process; and whether the government presented legally sufficient evidence to prove petitioner's guilt beyond a reasonable doubt.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THIS WRIT BECAUSE THE DECISION OF THE COURT OF MILITARY APPEALS SANCTIONS A SYSTEM WHICH FAILS TO EFFECT THE CONSTITUTIONALITY MANDATED REASONABLE DOUBT STANDARD.

Due process protects an accused against conviction except upon proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 359, 364 (1970). Service members are entitled to this protection. *United States v. Ezell*, 6 M.J. 307, 313 (C.M.A. 1979). In order to give *substance* to the reasonable doubt standard, due process further requires that a "substantial majority" of the triers of fact agree that an accused is guilty. *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) (state's statutory scheme, allowing conviction by a vote of nine to three, complies with due process). In this case, the decision of the Court of Military Appeals sanctions a system which allows for conviction by less than a "substantial majority" of the triers of fact.

A brief overview of the military justice process will help crystallize petitioner's assertion. All military prosecutions (capital cases excepted) require only a two-thirds majority vote to convict.[4] Furthermore, non-petty offenses may be heard by a general court-martial, the type of court employed in petitioner's case, numbering as few as five members.[5] Combined, these provisions allow for con-

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[4] 10 U.S.C. § 852(a)(2), Article 52(a)(2), Uniform Code of Military Justice (1982). *All* other federal criminal courts require unanimity to convict. FED. R. CRIM. P. 31(a); *United States v. Scalzitti*, 578 F.2d 507, 512 (3rd Cir. 1978): "Unanimity is an indispensable element of a federal jury trial . . . ."

[5] 10 U.S.C. § 816, Article 16, Uniform Code of Military Justice (1982). *All* other jurisdictions in the United States must meet the constitutional requirement that juries consist of at least six members. *Ballew v. Georgia*, 435 U.S. 233 (1978).

viction at a general court-martial for a non-petty offense by, for example, a vote of four to one.[6]

Judicial review of courts-martial findings begins with a court of military review.[7] In order to protect against erroneous factual determinations at the trial level, Congress has granted the Courts of Military Review extensive fact finding powers. In short, these courts are second triers of fact. They may "weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact."[8] Unlike any other federal or state appellate court in this nation, the Courts of Military Review are required to review the *weight*, as well as the sufficiency, of the evidence.[9] This "awesome, plenary, de novo power of review" grants the Court of Military Review authority to substitute its judgment for that of the initial trier of fact. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Rule 4(a), Courts of Military Review Rules of Practice and Procedure, calls for majority rule on all matters referred to the Courts of Military Review, including the issue of guilt beyond a reasonable doubt. In petitioner's case, only two of the three panel members were convinced of petitioner's guilt beyond a reasonable doubt. This two-thirds vote by a panel of three, if sanctioned by this

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[6] On the contrary, if a state jury consists of the constitutional minimum of six members, it must vote *unanimously* to convict. *Burch v. Louisiana*, 441 U.S. 130 (1979).

[7] The Department of the Army, Navy, and Air Force each have a court of review composed of active duty officers. The Coast Guard also has a court of review composed primarily of military officers. The Navy-Marine Corps Court of Military Review regularly sits, as it did in the case at bar, in panels of three officers. En banc, the Court numbers nine officers.

[8] 10 U.S.C. § 866(c), Article 66(c), Uniform Code of Military Justice.

[9] *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). *Compare Jackson v. Virginia*, 443 U.S. 307, 319: The test for sufficiency of the evidence is whether a "national trial of fact *could have found* the essential elements of the crime beyond a reasonable doubt." (Emphasis added.)

Court, would present the slimmest majority ever deemed "substantial" under the due process clause. *Johnson v. Louisiana*, 406 U.S. at 362.

Petitioner stresses that he is not challenging the constitutionality of trial level decision-making in the military. Only one federal appellate court has addressed a due process challenge to a two-thirds verdict rendered at a court-martial. *Mendrano v. Smith*, 797 F.2d 1538 (10th Cir. 1986). Though that court found the issue "close and troubling," it granted approval of the statutory scheme as an accommodation to the military's "critical mission to prepare for and win wars . . . ." *Mendrano*, 797 F.2d at 1546. Petitioner simply maintains that the three-member panels of the Courts of Military Review, acting as second triers of fact, are a necessary component of the military justice system which, in order to do justice, must render their decisions on the issue of guilt unanimously.[10]

Neither an accused nor society can place complete confidence in courts-martial decisions, because those decisions are often rendered by small groups voting non-unanimously.[11] This renders unanimity of the three-member panels of Military Courts of Review on the issue of guilt beyond a reasonable doubt essential in order to give substance to the reasonable doubt standard. The vote of two-to-one, rendered by triers of fact at the review level in this case, presents a majority never before considered by the Supreme Court, or any other court, as "substantial." *See Johnson v. Louisiana*, 406 U.S. at 362. It is a vote which altogether fails to resolve the issue of petitioner's guilt beyond a reasonable doubt.

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[10] Importantly, none of the considerations unique to the military, which explain the deference granted the military for non-unanimous decisions at the court-martial level, pertain to the review stage. *See Mendrano v. Smith*, 581 F.2d at 1545.

[11] "Both the defendant and society can place special confidence in a unanimous verdict . . . ." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978).

CONCLUSION

Petitioner respectfully requests that this petition be granted to ensure that those serving in our armed forces are judged guilty of criminal offenses only upon proof beyond a reasonable doubt. At the court-martial level, a military accused can be convicted by a margin unacceptable in any other court of law in this nation. To protect against error, three-member panels of the Courts of Military Review have been granted the responsibility of weighing the evidence and independently applying the reasonable doubt standard. Only by requiring that they render their decisions *unanimously* on the issue of guilt can we ensure that the requisite "substantial majority" of the triers of fact agree.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 65267/MC
CMR Dkt. No. 89-1152

UNITED STATES,
Appellee

v.

JAMES N. MOSS (246-02-8038),
Appellant

ORDER

On further consideration of the granted issues (Daily Journal, December 4, 1990), it is by the Court, this 7th day of January, 1991

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (PARRISH)
Appellate Government Counsel (SPRANCE)

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

Before E. M. ALBERTSON, KENT A. WILLEVER, R. A. JONES.

UNITED STATES

v.

JAMES N. MOSS, 246 02 8038

Staff Sergeant (E-6), U.S. Marine Corps

NMCM 89 1152 Decided 18 May 1990

Sentence adjudged 5 May 1988. Military Judge: J.R. Gentry. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, SC 29905

CHARLES F. BLACKBURN, Civilian Defense Counsel
LT WADE W. PARRISH, JAGC, USNR, Appellate Defense Counsel
LT WILLIAM R. SPRANCE, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignments of error,[1] and the government's reply thereto, and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence, as approved on review below, are affirmed.

(See Dissenting Opinion)

E. M. ALBERTSON, Senior Judge

KENT A. WILLEVER, Judge

R. A. JONES, Judge

ALBERTSON, Senior Judge (dissenting):

After giving due deference to the military judge's having seen and heard the witnesses, I am still not convinced beyond a reasonable doubt of appellant's guilt. Article 66(c), Uniform Code of Military Justice. Accordingly, I would reverse.

E. M. ALBERTSON

[1] Appellate defense counsel assigned the following error:

I. THE GOVERNMENT FAILED TO PROVE APPELLANT GUILTY BEYOND A REASONABLE DOUBT.

II. THE MILITARY JUDGE ERRED IN FAILING TO DECLARE A MISTRIAL AFTER HE IMPROPERLY HEARD THE TESTIMONY OF A GOVERNMENT WITNESS ON RAPE TRAUMA SYNDROME.

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